

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Application of California-American
Water Company (U210W) for
Approval of the Monterey Peninsula
Water Supply Project and
Authorization to Recover All Present
and Future Costs in Rates.

A.12-04-019

(Filed April 23, 2012)

**REPLY TO CALIFORNIA-AMERICAN WATER'S RESPONSE
TO WATER PLUS' MOTION TO DISMISS THE PROCEEDING
ON THE MONTEREY PENINSULA WATER SUPPLY PROJECT**

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I. INTRODUCTION

Pursuant to Rule 11.1(f) of the Rules of Practice and Procedure, Water Plus files this reply to the 13 April 2016 response (“Response”) by California-American Water (“Cal Am” or “the company”) to the 30 March 2016 Water Plus Motion to Dismiss (“Motion to Dismiss”) the Proceeding on the Monterey Peninsula Water Supply Project (“MPWSP”). On 15 April 2016, ALJ Burton Mattson, on behalf of ALJ Gary Weatherford, authorized this reply in writing via email.

Cal Am claims that Water Plus bases its Motion to Dismiss on the following four issues: “(1) that California American Water’s amended project description violates the Agency Act,¹ (2) that California American Water’s test well has violated its Coastal Commission permit, (3) that the water from the groundwater recharge project (“GWR”) will be unsafe, unreliable, and too costly, and (4) that the model used for the Commission’s environmental review reveals fraud and data tampering.”

¹ Monterey County Water Resources Agency Act, Sec. 9(u): Prevent the export of groundwater from the Salinas River Groundwater Basin, except that use of water from the basin on any part of Fort Ord shall not be deemed an export. Nothing in this act prevents the development and use of the Seaside Groundwater Basin for use on any lands within or outside that basin.

This reply will deal with each of these four issues in turn, but first it will bring attention to a critical issue addressed in the Motion to Dismiss that Cal Am's Response failed to include, and that is the issue of necessity.

II. THE MPWSP IS NO LONGER NECESSARY

In concluding its response, Cal Am cited the 1 June 2012 denial of a motion to dismiss filed by the Marina Coast Water District ("Marina Coast"): "...Given the overarching public interest in finding a source or sources of replacement water for the Monterey Peninsula as soon as practicable, it is reasonable to proceed with A.12-04-019." That was four years ago, and so far Cal Am's project has produced no new water. Now, the company is seeking an additional five years to implement its project. Nine years hardly meets the criterion of urgency used by ALJ Weatherford to help support his denial of the Marina Coast motion to dismiss. In fact, implementation of Cal Am's project is now expected to fail by up to five years to meet the deadline ("state deadline") set by the State Water Resources Control Board ("SWRCB") at the end of this year. Simply put, that MPWSP, in consideration of the expectation of it to meet the state deadline, is a failure. The Commission should not continue to ride a dead horse in the hope that it may somehow revive, revitalize, and reach the

finish line. That is especially true because there are other horses in the race.

In its Motion to Dismiss, Water Plus reported that the People's Water Desalination Project at Moss Landing ("People's Project") was ahead of the MPWSP by months in the race to circulate a draft Environmental Impact Report ("DEIR"). Cal Am failed to acknowledge that fact in its Response to the Motion to Dismiss. Proposing open-ocean intake, the People's Project also faces none of the challenging obstacles confronting the MPWSP, notably: drilling wells without water rights, violation of the Agency Act by exporting groundwater from the Salinas Valley, violation of CEQA by converting a test well into an operating well prior to certification of an EIR, and committing fraud by countenancing data tampering in the evaluation of the model helping to justify the use of slant wells. The Motion to Dismiss, which described these challenges, some in great detail, is included here by reference.

Each of these challenges can take considerable time to surmount, and some may even prove to be insurmountable. All face court action against them. In fact, after failing so far to receive responses to demand letters in due course, Water Plus is prepared to file a writ of mandamus demanding

that Monterey County and the California Coastal Commission cease to aid and abet these illegal activities of Cal Am.²

Neither is Cal Am itself off the hook. In its Motion to Dismiss, Water Plus cited California Public Utilities Code 2106, which makes public utilities financially liable for unlawful actions to persons or corporations affected by them. Among those affected are Monterey Peninsula ratepayers and the Commission itself, for which the writ filed by Water Plus will be seeking damages. The Commission can, and in the view of Water Plus, should put an end to this unfortunate sequence of events by dismissing the MPWSP as soon as possible.

For all these reasons, the People's Project is likely to reach fruition long before the MPWSP, if permitted to go forward. Two desalination projects not being necessary, that means that the Commission no longer needs to continue reviewing the MPWSP while Cal Am fruitlessly incurs expenses in addition to the \$48 million it has already spent on the project. By the time the MPWSP might reach completion, it would no longer be necessary. Pursuit of a CPCN for the MPWSP has become a waste of time and money, and, if only for this one reason, the Commission should dismiss the project.

² Appendix A contains a draft attachment to a cover letter directed particularly to the Coastal Commission.

III. CAL AM'S TEST WELL VIOLATES CEQA

Although in its Response Cal Am discounted the CEQA violation as a California Coastal Commission permit violation, it is more than just that. A CEQA violation involving the Cal Am plan to use the test well as an operating project well without an EIR preceding the test-well operation is a violation of state law that exists in and of itself, independently of any permit violation. Public Utilities Code Section 2106 applies particularly to such a violation. While operating the test well, Cal Am in its Amended Application has requested the Commission to approve inclusion of the test well as an operating well in the MPWSP. By granting that request, the Commission would be aiding and abetting illegal behavior. The Commission should not do that. Instead, the Commission should deny the Amended Application in its entirety and dismiss the proceeding on the MPWSP as a series of costly trials and errors leading to no certain outcome other than termination.

IV. GWR IS UNRELIABLE, TOO COSTLY, AND UNSAFE

The uncontested 22 January 2016 Water Plus testimony dealt with this topic in detail and is included here by reference, as is the 20 April 2016 Water Plus Response to the 18 April 2016 Joint Motion for a Separate Phase 2 Decision ("Joint Motion"). Suffice it to reiterate here that, at a rate of \$6,000 per acre-foot for Monterey Peninsula ratepayers, GWR is excessively

costly. Troubling as it is, that is not GWR's most troubling problem.

Because of its dependence for source water on (a) sewer water varying in availability with climate changes and (b) pesticide-ridden agricultural runoff water varying in toxicity with changes in the weather, GWR is both unreliable and a serious threat to public health and safety, presaging a local disaster like Flint, Michigan. Not only should the Commission deny the Joint Motion bifurcating the MPWSP, it should also dismiss the proceeding on the entire project.

V. THE WATER PLUS ALLEGATION OF FRAUD REMAINS UNCHALLENGED

In its 1 October 2015 Motion to Dismiss ("Previous Motion"), Water Plus cited data tampering as a reason for project dismissal. Data tampering is no trivial matter. People responsible for the Flint, Michigan, disaster are facing criminal charges of data tampering that could lead to prison sentences. To say that Cal Am has been cavalier in its Response to the Water Plus allegation of data tampering would be a gross understatement. In that Response, Cal Am felt content to dismiss the issue of data tampering simply by citing the 29 October 2015 ALJ ruling denying the Previous Motion: "The assigned Administrative Law Judge has already ruled that Water Plus' accusations of data tampering and fraud do not provide justification for

dismissing California American Water's application." Denying the motion does not deny the existence of data tampering. California Public Utilities Code Section 2106 prohibits a public utility from not only committing, but also permitting, unlawful behavior. By failing to investigate the allegation of data tampering in its positive project evaluation, Cal Am may be permitting unlawful behavior, especially since that evaluation may be fraudulently positive. Cal Am has the obligation to investigate the Water Plus allegation of data tampering, to confirm or refute it. That investigation is not difficult work.

In fact, Water Plus has already done the work, confirming the existence of data tampering in Cal Am's project evaluation. As observed in the Motion to Dismiss, "Varying from well site to well site and from time to time, water elevation measurements consist of two separate components, a predicted and an unpredicted (error) component, each of which accounts for a percentage of the measurement variation, the two percentages adding up to 100, no more and no less. Otherwise, a portion of the measurement variation would be either both predictable and unpredictable (overlap) or neither predictable nor unpredictable (gap), illogical occurrences that could result only from data tampering." As virtually any statistics book will point out, the squared correlation coefficient between two variables describes the

proportion of the variation in one of them accounted for by the other. That being so, the squared correlations between a measurement and its predicted component and between the measurement and its error component should sum to one. In the Previous Motion, based on an analysis of data provided to it by the Commission, Water Plus indicated that for 993 water-elevation measurements taken in the 180-foot aquifer the sum $(.68 + .02)$ was equal to $.70$, far from 1.00 . That 30-percent gap reveals data manipulation likely intended to reduce the error variation $(.02)$ without changing the measurements—the smaller the error variation, the better the model appears to fit the data. Anyone familiar with Excel and having access to the data provided to me by the Commission can confirm these numbers. They are facts. Data tampering is therefore not simply an allegation. The combination of logic and facts constitutes a demonstration of the existence of data tampering in the evaluation of the model used to help support the MPWSP.

In response to the disclosure of conflict of interest, the Commission replaced Geoscience with another consultant. Yet, Cal Am has continued to retain Geoscience as its consultant, designing and evaluating the project's proposed slant wells in a continuation of the conflict of interest, while the company signals no intention to follow the Commission's example. That

being the case, the Commission should wash its hands completely of this sordid affair by dismissing the proceeding on the MPWSP as soon as practicable.

VI CONCLUSION

For these reasons, Water Plus urges the Commission forthwith to dismiss the proceeding on the Monterey Peninsula Water Supply Project.

Dated April 21, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ron Weitzman", written in a cursive style.

Ron Weitzman

President, Water Plus

APPENDIX A

ATTACHMENT “A” to CALIFORNIA COASTAL COMMISSION

California-American Water Company (“Cal-Am”) constructed a test slant well and pilot program (including the slant well, a submersible well pump, a wellhead vault, and related facilities). The test slant well was screened at depths corresponding to both the Dune Sand Aquifer and the underlying 180-Foot-Equivalent Aquifer of the Salinas Valley Groundwater Basin. This slant test well has been intermittently operational since April 2015. When operational, the test well has extracted approximately 2,000 gallons per minute from the Dune Sand Aquifer and the 180-foot-Equivalent Aquifer of the Salinas Valley Groundwater Basin.

The Salinas Valley groundwater basin has been identified as being in overdraft by the California Department of Water Resources, the California Coastal Commission, and the Monterey County Water Resources Agency (MCWRA) for over 60 years. The sole source of recharge to the aquifer is rainfall and water percolated into the Salinas River from water supply projects paid for, pursuant to Proposition 218 requirements and provisions of the California Constitution, by overlying land owners (assesses) within the basin. Further, the overdraft in the North County aquifers has been publicly acknowledged for decades by the Monterey County Board of Supervisors and the California Coastal Commission in the certified "North County Local Coastal Plan" (1982), the Monterey County General Plan (1984 and 2010) and the North County Area Plan (1984).

Cal-Am wants to be a junior water appropriator without overlying or senior groundwater rights. Cal-Am has no groundwater rights and cannot acquire any. Cal Am has conducted water quality sampling that already shows that its proposed extended pumping of the test well has and will continue to intentionally and significantly draw water from “fresh” potable aquifers without a claim of right. Further, the test well has and will result in a huge cone of depression in the area surrounding the test well, and the excessive duration (2 years) of Cal-Am’s intended pumping, has and will result in the contamination of surrounding wells (including wells owned by the Ag Land Trust) and the unlawful “taking” of potable groundwater from beneath the adjacent properties.

I. VIOLATIONS OF MANDATORY NORTH MONTEREY COUNTY LOCAL COASTAL PLAN REQUIREMENTS

A. Applicable Provisions of the Coastal Plan

The “test well” directly violates the following policies / mandates of the certified North Monterey County Local Coastal Plan that Monterey County and the Coastal Commission are required to uphold and enforce:

NMCLCP 2.5.1 Key Policy:

- The water quality of the North County groundwater aquifers shall be protected, and new development shall be controlled to a level that can be served by identifiable, available, long term-water supplies. The estuaries and wetlands of North County shall be protected

from excessive sedimentation resulting from land use and development practices in the watershed areas.

NMCLCP 2.5.3 Specific Policies

- The County's Policy shall be to protect groundwater supplies for coastal priority agricultural uses with emphasis on agricultural lands located in areas designated in the plan for exclusive agricultural use.
- The County's long-term policy shall be to limit groundwater use to the safe-yield level. The first phase of new development shall be limited to a level not exceeding 50% of the remaining buildout as specified in the LUP. This maximum may be further reduced by the County if such reductions appear necessary based on new information or if required in order to protect agricultural water supplies. Additional development beyond the first phase shall be permitted only after safe-yields have been established or other water supplies are determined to be available by an approved LCP amendment. Any amendment request shall be based upon definitive water studies, and shall include appropriate water management programs.
- The County shall regulate construction of new wells or intensification of use of existing water supplies by permit. Applications shall be regulated to prevent adverse individual and cumulative impacts upon groundwater resources.

Cal-Am's illegal pumping and then its “wasting/dumping” of the potable groundwater resources will result in significant individual and cumulative adverse impacts, immitigable permanent damage, a continuing nuisance, and irreversible seawater intrusion into the potable groundwater resources and aquifers of the Salinas Valley Groundwater Basin. Further, it will cause irreparable damage to the adjacent protected prime coastal farmlands in violation of the certified Local Coastal Plan.

B. Harm to the Groundwater Supply

The harm to the North Monterey County groundwater supply is evidenced by Cal-Am's violation of three separate laws. First, Cal-Am's actions violate the new mandates of Governor Brown's groundwater legislation that specifically identifies (and prohibits) “significant and unreasonable seawater Intrusion” as an “Undesirable Result” that must be avoided in the management of potable groundwater basins, and specifically in the Salinas Valley. (See AB 1739 (Dickinson); SB1168 (Pavley); and SB1319 (Pavley) signed by Governor Brown in October, 2014).

Second, Cal-Am, through its test well, intends to intentionally contaminate a potable groundwater supply in violation of multiple state regulations and water quality laws. The California Regional Water Quality Control Board – Central Coast (CCRWQCB) is tasked with the adoption and enforcement of the Water Quality Control Plan for the Central Coastal Basin. The Plan was adopted in June 2011 and references the SWRCB Non-Degradation Policy adopted in 1968 which is required to be enforced by the CCRWQCB: “wherever the existing quality of

water is better than the quality of water established herein as objectives, such existing quality shall be maintained unless otherwise provided by the provisions of the State Water Resources Control Board Resolution No. 68-16, Statement of Policy with Respect to Maintaining High Quality of Waters in California, including any revisions thereto.”

Third, Cal-Am’s test well, and its removal of groundwater from the basin (and discharging that groundwater into the Pacific Ocean) violates several aspects of California groundwater rights law:

- In an over-drafted percolated groundwater basin, there is no groundwater available for junior appropriators to take outside of the basin. (*Katz v. Walkinshaw* 141 Cal. 116 (1902)). This is the situation in the over-drafted Salinas Valley percolated groundwater basin, there is no "new" groundwater underlying the over-drafted Salinas aquifers. Cal-Am is a junior appropriator that has no rights to groundwater in the Salinas Valley, and it can't get any.
- The “Doctrine of Correlative Overlying Water Rights,” as created and interpreted by the California Supreme Court in *Katz v. Walkinshaw* 141 Cal. 116, and as reiterated for the last 110 years (most recently in *City of Barstow v. Mojave* 23 Cal.4th 1224 (2000)), prohibits any land owner in an over-drafted percolated groundwater basin from pumping more than that land owner's correlative share of groundwater from the aquifer as against all other overlying water rights holders and senior appropriators. CEMEX (the landowner where Cal-Am’s wells are located) is only allowed to pump a fixed (correlative) amount of water for beneficial uses solely on its’ property.
- Finally, Cal Am has indicated that it intends to not use, but intends to “dump” the water it pumps from its “test well,” including the Trust’s potable water, back into the ocean, thereby constituting a prohibited “waste of water” and a direct violation of Article X, Sec.2 of the Constitution of California and the “Doctrine of Reasonable Use” (*Peabody v. Vallejo* (1935) 2 Cal.2d 351-371).

II. VIOLATION OF THE MONTEREY COUNTY WATER RESOURCES AGENCY ACT

Cal Am now proposes to obtain the project’s source water from aquifers that are a part of the Salinas Valley Groundwater Basin. (See Change in project description in CPUC A.12-04-019, Service of Amended Application dated March 14, 2016.) That proposed action is in direct violation of the state Agency Act, which prohibits the exportation of groundwater from the Salinas Valley. Previously, in this application, Cal Am planned to draw its source water via slant wells from under the seafloor because the company lacked water rights to draw water from the SVGB. This earlier planned action was also supposed to avoid violation of the state Agency Act, the assumption being that the water was not going to be drawn from the SVGB despite the well-known fact (McMillian, 2006) that the basin extends miles out to sea. Now, the source water being affirmed to be groundwater within the SVGB, the Agency Act, as well as the water-rights issue, comes into play.

Recognizing that the groundwater it now plans to use for source water contains a significant component of potable water, Cal Am is proposing to satisfy the Agency Act by

returning the potable component to the SVGB by selling the water to another party that has no overlying rights. Cal-Am's plan is premised on the argument that desalinated water can be broken down into (i) the freshwater component of the groundwater, and (ii) the seawater component of the groundwater, which is then filtered to produce potable water. Accordingly, to Cal-Am, so long as it returns the "freshwater" portion of the groundwater, it can discard the rest of the groundwater without violating the Agency Act.

The Agency Act refers simply to groundwater. It does not distinguish between the sub-components of the groundwater because California case law and the statutes make no such contrived distinctions. Moreover, the attempt to differentiate the sub-components of the groundwater was foreclosed by CPUC ALJ Weatherford:

In addition, Marina Coast assumes that the desalination plant is a "water source," and based on that assumption, Marina Coast argues that the desalination plant falls outside of the Commission's purview. (Marina Coast Reply Brief at 1-2.) Marina Coast's assumption is incorrect. While the proposed desalination plant may produce fresh water, it is not the source or supply of water – the source of water would be the ocean (or possibly groundwater). Treatment of surface water or groundwater does not make the treatment plant the "source" of that water. Likewise here, treatment of seawater (including desalination) does not make the treatment plant the source of the water.

Excerpt from p. 15 of D.12-10-030 (31 October 2012).

III. VIOLATIONS OF PERMIT TERMS AND CONDITIONS

Cal-Am's permit to construct and operate the test well was based on certain representations and subject to a number of Special Conditions. Cal-Am is in violation as follows:

- The slant well concept was introduced to the CCC as an ecologically-friendly way to draw ocean water from Monterey Bay for desalination. The design was altered in a bait-and-switch manner – right before permit approval, the wellhead location was moved 200 feet further inland. The test well no longer has sub ocean intake, but now draws entirely the brackish water of the already over drafted 180 foot aquifer beneath the beach and dunes of Marina. While the CCC maintained that the revised wellhead would be located "in the surf zone," it is clear that the screened intake extends throughout the 180 foot aquifer, beneath the beach and dunes.
- Cal-Am is required to de-commission the test slant well at the conclusion of the test period (Special Condition 6, para. 2 (p.6)), and must post a \$1,000,000 bond "to guarantee the Permittee's compliance" (Special Condition 17 (p.12)). At present, Cal-Am has not posted the \$1,000,000 bond, and it has indicated that it will not decommission the test well at the expiration of the test period.
- Special Condition 6 requires that all project components remain covered. If the wellheads, linings, casings, or other project components become exposed due to erosion,

Cal-Am must submit an application for an amended permit remedying the exposure. The project components have become exposed due to erosion, but the “remedy” contained in Cal-Am’s amended permit application (and approved by the Coastal Commission) does not result in a complete covering of all project components. Rather, certain components will remain above grade, constituting a dangerous condition. Moreover, even this limited covering will not take place immediately, but will occur gradually due to natural sand deposition. This violates Special Condition 6, which requires a full covering of all project components and prompt remedying of violations.

Special Condition 11 prohibits a TDS increase of 2000 ppm. Since the beginning of the test slant well pumping, salinity levels in the monitoring wells have increased significantly more than 2000 ppm, demonstrating Cal Am’s knowing contamination of the statutorily and regulatorily protected groundwater.